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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte THEODORE R. ZEIGLER

Appeal 2009-007562
Application 10/779,641
Technology Center 3600

Before: JENNIFER D. BAHR, MICHAEL W. O'NEILL, and FRED A.
SILVERBERG, *Administrative Patent Judges.*

BAHR, *Administrative Patent Judge.*

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Theodore R. Zeigler (Appellant) appeals under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claims 1-10 and 15 under 35 U.S.C. § 103(a) as being anticipated by US Patent 5,274,980 to Zeigler (hereinafter "Zeigler '980"), claims 11-14 under 35 U.S.C. § 103(a) as being unpatentable over Zeigler '980 and US Patent Application Publication 2002/0189659 A1 (hereinafter "Carter"), and claims 16 and 18-24 under 35 U.S.C. § 103(a) as being unpatentable over Zeigler '980 and US Patent 6,141,934 to Zeigler (hereinafter "Zeigler '934"). Claims 17 and 25 have been canceled. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

The Invention

Appellant's claimed invention is directed to expandable and collapsible structures including split scissor assemblies. Spec., para. 1.

Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. An expandable and collapsible scissor assembly for an expandable and collapsible structure, comprising:

a first strut having a first end and a second end;

a second strut upper portion having a first end and a second end, the first end of the second strut upper portion being pivotably connected to the first strut at an upper strut connection point; and

a second strut lower portion having a first end and a second end, the second end of the second strut lower portion being pivotably connected to the first strut at a lower strut connection point,

wherein the lower strut connection point is between the upper strut connection point and the first end of the first strut

and the scissor assembly is movable between a folded position and an expanded position, wherein, when the scissor assembly is in the folded position, the first end of the first strut and the second end of the second strut upper portion are substantially adjacent and the second end of the first strut and the first end of the second strut lower portion are substantially adjacent.

SUMMARY OF DECISION

We REVERSE.

ISSUE

The dispositive issue raised in this appeal is whether the end of arm member 232 of Zeigler '980 labelled "1st strut 2nd end" in the "Modified Figure 3A" on page 15 of the Examiner's Answer and labelled "2nd end, 1st strut" in "Modified Figure 3C" on page 16 of the Examiner's Answer is "substantially adjacent" the end of the arm 228 pivotally joined to leg 220, labelled "2nd lower strut, 1st end" in "Modified Figure 3A" and labelled "1st end, 2nd strut lower portion" in "Modified Figure 3C" so as to satisfy the limitation in claim 1 that with the scissor assembly in the folded position, "the second end of the first strut and the first end of the second strut lower portion are substantially adjacent." This issue turns on whether the Examiner has given the terminology "substantially adjacent" its broadest reasonable interpretation consistent with Appellant's Specification. *See In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (when claim terminology is construed in the United States Patent and Trademark Office, claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art).

FACTS PERTINENT TO THE ISSUE

1. Appellant's Specification does not explicitly define the terminology "substantially adjacent." Appellant's Specification does, however, describe the split scissor assembly depicted in the folded position in Figure 2A as comprising the first end 25' of the first strut 25 and the second end 27" of the second strut upper portion 27 being "substantially adjacent," and the second end 25" of the first strut and the first end 31' of the second strut lower portion 31 being "substantially adjacent." Spec., para. 23.

2. Appellant's Figure 2A is reproduced below:

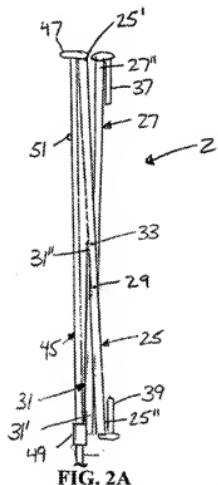


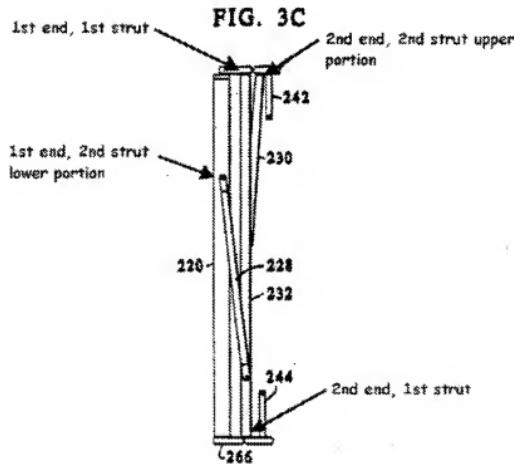
Figure 2A depicts Appellant's split scissor assembly in the folded position.

3. Appellant's Specification contrasts the term "proximate" with the term "adjacent" by stating that "[p]roximate, in the sense used here, means

that the strut ends are close but not necessarily adjacent to one another and is meant to contrast with the situation where the strut ends are particularly remote." Spec., para. 23.

4. An ordinary and customary usage of the term "adjacent" is "near or close (to something); adjoining." *Webster's New World Dictionary* 17 (David B. Guralnik ed., 2nd Coll. Ed., Simon & Schuster, Inc. 1984).
5. The Examiner reproduced and modified Figure 3C of Zeigler '980 on page 16 of the Answer as "Modified Figure 3C" to illustrate how the Examiner was reading the claim limitations on the structure of Zeigler '980. The Examiner's "Modified Figure 3C" is reproduced below:

Modified Figure 3C



"Modified Figure 3C" is a reproduction of Figure 3C of Zeigler '980 annotated by the Examiner to identify the structure corresponding to the first and second ends of the first strut and the second and first ends, respectively,

of the second strut upper portion and second strut lower portion. This Figure depicts the split scissor unit of Zeigler '980 in the folded position.

DISCUSSION

Anticipation Rejection

As depicted in "Modified Figure 3C," (*see Fact 5*) the end of first strut (member 232) of Zeigler '980 identified by the Examiner as the second end ("2nd end, 1st strut") is disposed at a location which is spaced from the location of the first end of the second strut lower portion ("1st end, 2nd strut lower portion") by a substantial portion, i.e., more than two-thirds, of the length of the first strut, when the scissor unit is in the folded position. We agree with Appellant that the Examiner's finding that this spacing satisfies the "substantially adjacent" limitation of claim 1 requires an unreasonably broad construction of "substantially adjacent" which is not consistent with the use of this terminology in Appellant's Specification. Appellant's illustration in Figure 2A of a scissor assembly comprising "substantially adjacent" first end 25' of first strut 25 and second end 27' of second strut upper portion 27 and "substantially adjacent" second end 25" of first strut 25 and first end 31' of second strut lower portion 31 (*see Facts 1 and 2*) clearly conveys that the terminology "substantially adjacent" is used to describe a very close spatial relationship. The Specification's contrasting of the term "proximate" with the term "adjacent" (*see Fact 3*) is also consistent with such an interpretation of "substantially adjacent." While the term "substantially" in claim 1 allows for some incidental relative offset of the recited ends, the Examiner's construction of "substantially adjacent" as encompassing an offset on the order of a substantial portion, i.e., more than

two-thirds, of the length of the first strut, effectively ignores the term “adjacent” (*see Fact 4*), rendering it superfluous,² and thus is unreasonably broad and not supported by Appellant’s Specification.

We do not sustain the Examiner’s rejection of claim 1 and claims 2-10 and 15, which depend from claim 1.

Obviousness Rejection based on Zeigler ‘980 and Carter

The Examiner’s rejection of claims 11-14, which depend from claim 1, as unpatentable over Zeigler ‘980 and Carter appears to be grounded in part on the Examiner’s flawed finding that the end of arm member 232 of Zeigler ‘980 labelled “2nd end, 1st strut” in “Modified Figure 3C” on page 16 of the Examiner’s Answer is “substantially adjacent” the end of the arm 228 pivotally joined to leg 220, labelled “1st end, 2nd strut lower portion” in “Modified Figure 3C” so as to satisfy the limitation in claim 1 that with the scissor assembly in the folded position, “the second end of the first strut and the first end of the second strut lower portion are substantially adjacent.”

While the Examiner concludes that it would have been obvious “to modify the leg and strut configuration of Zeigler ‘980 with the pivotable and slidable connection of Carter in order to allow the tent to be opened to different sizes, while maintaining a rigid structure” (Ans. 8), the Examiner does not specify where such a pivotable and slidable connection is to be incorporated into the scissor unit of Zeigler ‘980 or assert that, much less explain how, such modification would overcome the deficiency of Zeigler ‘980 discussed above.

² See *Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007) (denouncing claim constructions which render phrases in claims superfluous).

We do not sustain the rejection of claims 11-14 as unpatentable over Zeigler '980 and Carter.

Obviousness Rejection based on Zeigler '980 and Zeigler '934

Independent claims 16 and 21 contain the same limitation as in claim 1 discussed above that with the scissor assembly in the folded position, “the second end of the first strut and the first end of the second strut lower portion are substantially adjacent.” Claims 18-20 depend from claim 16, and claims 22-24 depend from claim 21. In rejecting these claims, the Examiner concludes that it would have been obvious “to combine the left and a right split scissor assembly of Zeigler '980 with the front and a back scissor assembly of Zeigler '934.” Ans. 10. The Examiner does not explain, nor is it apparent, how such a combination would make up for the deficiency in Zeigler '980 discussed above.

We do not sustain the rejection of claims 16 and 18-24.

CONCLUSION

The Examiner’s rejections are fatally tainted by a construction of the claim terminology “substantially adjacent” that is unreasonably broad and not consistent with Appellant’s Specification.

DECISION

The Examiner’s decision is reversed.

REVERSED

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hh

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